Supreme Court, U.S.
FILED
APR 8 1998
CLERK

No. 97-1483

In The

Supreme Court of the United States

October Term, 1997

LINDA K. BURNSIDES, suing on behalf of herself individually and on behalf of a class of similarly-situated persons, MARY M. SORG, suing on behalf of herself individually and on behalf of a class of similarly-situated persons AND GARY VYBORNY, suing on behalf of himself individually and on behalf of a class of similarly-situated persons,

Petitioners,

v.

MJ OPTICAL, INC., Nebraska Corporation; OPTICAL ILLUSION, INC., Nebraska Corporation; COMMERCIAL OPTICAL COMPANY, INC., Nebraska Corporation; OPTICAL SERVICES, INC., Nebraska Corporation; C.O.C., INC., Nebraska Corporation; OPTICAL SERVICES LIMITED PARTNERSHIP; and SHELDON I. RIPS, an Individual,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

KEITH I. FREDERICK, ESQ.
Counsel of Record
JAMES F. KASHER, ESQ.
DAVID G. WILWERDING, ESQ.
CROKER, HUCK, KASHER, DEWITT, ANDERSON & GONDERINGER, P.C.
2120 South 72nd Street, Suite 1250
Omaha, NE 68124
(402) 391-6777

Attorneys for Respondents MJ Optical, Inc. and Optical Illusion, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The question presented by Petitioners does not accurately reflect the Eighth Circuit's decision or the District Court's decision in numerous respects. First, neither the District Court nor the Eighth Circuit held that MJ Optical, Inc. or Optical Illusion, Inc. (hereinafter jointly referred to as "MJ Optical") purchased "part or all of an employer's business . . . " within the meaning of the Worker Adjustment Retraining and Notification Act ("WARN") 29 U.S.C. § 2101(b). The District Court's Findings of Fact and Conclusions of Law held that MJ Optical did not purchase part or all of Commercial Optical's business. (App. 29a.) Thus, WARN did not apply to MJ Optical.

Second, contrary to the Petitioners' statements, the lower courts did not ignore the administrative regulations. Instead, both courts found that the administrative regulations are contrary to the plain meaning of the statute.

Finally, the question presented by Petitioners implies that the lower court rulings would create a period of time in which neither the "seller" nor the "purchaser" would have any responsibility for providing WARN Act notice. However, the Eighth Circuit specifically stated:

> Relying on 29 CFR § 639.4(c) which states responsibility for giving notice remains with the seller up to and including the effective date (time) of the sale, "the employees argue the sale became effective at closing on the morning of May 7th, and responsibility for giving notice transferred to MJ Optical then, before Commercial fired the employees or closed the plant. We

QUESTION PRESENTED – Continued

> reject the employees' interpretation of § 2101(b) because it is contrary to the plain terms of the statute. Under § 2101(b), the seller is the party responsible for giving notice during the effective date of the sale, and the asset purchase agreement declared it was "effective [the] 7th day of May." ***In sum, we conclude Commercial, not MJ Optical was responsible for giving the employees notice.***

128 F.3d at 703. (emphasis added)

In summary, the issue is not whether the lower courts' rulings ignored the administrative regulations, but, instead, whether the administrative regulation is contrary to the plain meaning of the statute. However, the question of whether or not the administrative regulation is contrary to the plain meaning of the statute was not even essential to the ruling in favor of MJ Optical. The District Court specifically found that MJ Optical was not a "purchaser" of "all or part of an employer's business . . . " within the meaning of 29 U.S.C. § 2101(b). Furthermore, although the Eighth Circuit did not specifically rely on that particular District Court finding, it did state:

> We doubt that § 2101(b) applies to the mere sale of assets in this case. Congress enacted the subsection to clarify that when employees are transferred from seller to buyer as part of a sale, employees have not suffered employment loss. *See, Hedrick v. Rockwell Internat'l Corp.*, 24 F.3d 1272, 1280-81 (10th Cir. 1994) (White, J.). Courts have held that § 2101(b) does not apply to asset sales when there is no transfer of any employees

QUESTION PRESENTED – Continued

> into the purchaser's employment along with the purchased assets. *See, Oil, Chemical and Atomic Workers Internat'l Union v. CIT Group/Capital Equipment Finance, Inc.*, 898 F. Supp. 451, 457 (S.D. Tex. 1995). We need not resolve the issue here, however, even if this case involves the "sale of part or all of an employer's business" within the meaning of § 2101(b), responsibility for giving notice never passed to MJ Optical because the plant closing occurred on the sale's effective date.

128 F.3d at 702.

In addition, although the District Court and Eighth Circuit found that Commercial Optical was an "employer" within the meaning of the WARN Act, Respondents have contended throughout these proceedings that Petitioners failed to prove that Commercial Optical employed 100 or more full-time employees and also failed to establish that 50 or more full-time employees suffered an "employment loss" due to the plant closing. Thus, Respondents would respectfully submit that the lower courts' decisions are further supported by Petitioners' failure to prove that the WARN Act applies in this instance.

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding. Respondents would note that Optical Illusion, Inc. was a wholly owned subsidiary of MJ Optical, Inc., and that Mr. Michael J. Hagge is the sole director and shareholder of MJ Optical, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING iv

TABLE OF CONTENTS v

TABLE OF AUTHORITIES vi

STATUTES INVOLVED IN THIS CASE 1

STATEMENT OF THE CASE 3

1. Statement of the Facts 4

2. The Petition Misrepresents the Decision of the United States District Court for the District of Nebraska 7

3. The Petition Misrepresents the Decision of the United States Court of Appeals for the Eighth Circuit 7

REASONS FOR DENYING THE WRIT 8

1. The Eighth Circuit's Opinion is Based Upon the Well Established Rule That Administrative Regulations Cannot Change the Plain Meaning of a Statute 8

2. There are no Conflicting Decisions 12

3. The Eighth Circuit's Opinion is Also Supported on Other Grounds 14

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Alter v. SCM Office Supplies, Inc., 906 F. Supp. 1243 (N.D. Ind. 1995) 16

Chevron, Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) 9

Finkler v. Elsinore Shore Assoc., 725 F. Supp. 828 (D. N.J. 1989) 12, 13

Hedrick v. Rockwell Internat'l Corp., 24 F.3d 1272 (10th Cir. 1994) 14

IATSE v. Metrocolor Laboratories, ___ F. Supp. ___, 5 IER 929 (C.D. CA 1990) 12, 13

International Alliance of Stage & Theatrical Employees v. Compact Video Services, 50 F.3d 1464 (9th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 514 (1995) 12, 13

Martin v. AMR Services Corp., 877 F. Supp. 108 (E.D.N.Y. 1995), *aff'd*, 68 F.3d 1529 (2d Cir. 1995) 16

McMartin Industries v. Vinal, 301 F. Supp. 749 (D. Neb. 1969), *affirmed*, 441 F.2d 1274 (8th Cir. 1971) 10

Moore v. Warehouse Club, Inc., 992 F.2d 27 (3d Cir. 1993) 16

Oil, Chemical and Atomic Workers Internat'l Union v. CIT Group/Capital Equipment Finance, Inc., 898 F. Supp. 451 (S.D. Tex. 1995) 14

Rifkin v. McDonald-Douglas Corp., 78 F.3d 1277 (8th Cir. 1996) 16

TABLE OF AUTHORITIES – Continued

Page

SEC v. SLOAN, 436 U.S. 103, 98 S.Ct. 1702, 56 L.Ed.2d 148 (1978) 9

United States v. Larinoff, 431 U.S. 864, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977) 9

Volkswagenwerk Aktiengesellscheft v. Federal Maritime Commission, 390 U.S. 261, 88 S.Ct. 929, 19 L.Ed.2d 1090 (1968) 9

Wiltz v. M/G Transport Services, Inc., 128 F.3d 957 (6th Cir. 1997) 15

STATUTES AND RULES

29 U.S.C. § 2101(a)(2) 1, 15

29 U.S.C. § 2101(a)(8) 15

29 U.S.C. § 2101(b) 4, 7, 14

29 U.S.C. § 2101(b)(1) 8, 9

29 U.S.C § 2102(b) 1, 3, 16

29 CFR § 639.4(c) i

Sup. Ct. R. 10 13

STATUTES INVOLVED IN THIS CASE

In addition to the statute set forth in the Petition for a Writ of Certiorari, 29 U.S.C. § 2101(a) and 29 U.S.C. § 2102(b) are applicable to this case. 29 U.S.C. § 2101(a) provides:

> (a) Definitions
>
> As used in this chapter –
>
> (1) the term "employer" means any business enterprise that employs –
>
> (A) 100 or more employees, excluding part-time employees; or
>
> (B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime);
>
> (2) the term "plant closing" means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees;
>
> (3) the term "mass layoff" means a reduction in force which –
>
> (A) is not the result of a plant closing; and
>
> (B) results in an employment loss at the single site of employment during any 30-day period for –
>
> (i)(I) at least 33 percent of the employees (excluding any part-time employees); and

(II) at least 50 employees (excluding any part-time employees); or

(ii) at least 500 employees (excluding any part-time employees);

(4) the term "representative" means an exclusive representative of employees within the meaning of section 159(a) or 158(f) of this title or section 152 of Title 45;

(5) the term "affected employees" means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer;

(6) subject to subsection (b) of this section, the term "employment loss" means (A) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period;

(7) the term "unit of local government" means any general purpose political subdivision of a State which has the power to levy taxes and spend funds, as well as general corporate and police powers; and

(8) the term "part-time employee" means an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required.

29 U.S.C. § 2102(b) provides:

> (b) Reduction of notification period
>
> (1) An employer may order the shutdown of a single site of employment before the conclusion of the 60-day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.
>
> (2)(A) An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required.
>
> (B) No notice under this chapter shall be required if the plant closing or mass layoff is due to any form of natural disaster, such as a flood, earthquake, or the drought currently ravaging the farmlands of the United States.
>
> (3) An employer relying on this subsection shall give as much notice as is practicable and at that time shall give a brief statement of the basis for reducing the notification period.

STATEMENT OF THE CASE

Contrary to the representation of Petitioners, this case does not involve the right of employees to receive

WARN Act notice when their employment is terminated during a sale of all or part of a business. The District Court specifically found that this case did not involve the "sale of all or part of a business" within the meaning of 29 U.S.C. § 2101(b). Moreover, although it based its decision on other grounds, the Eighth Circuit clearly indicated that it did not believe that this case involved the sale of all or part of a business within the meaning of § 2101(b).

1. Statement of the Facts.

Commercial Optical had been experiencing severe financial difficulties and for some time had been attempting to find some source of financing or additional capital to continue its operations. In March of 1993, Commercial Optical and MJ Optical began discussing a possible merger. A letter of intent was signed on March 24, 1993, which clearly contemplated a merger or acquisition. The letter of intent provided that MJ Optical would purchase all of the assets, accounts, contracts and intangible property of Commercial Optical, and would operate the plant for 45 days using Commercial Optical employees. MJ Optical was also granted an option to lease the Commercial Optical plant beyond the 45 days. Negotiations continued until May 2, 1993, when a meeting was held among Mr. Sheldon Rips, President of Commercial Optical; Commercial Optical's attorney, Jerry Slusky; Mr. Michael Hagge, President of MJ Optical; and MJ Optical's attorney, Paul J. Gardner. During this meeting, Mr. Rips indicated that he wanted $500,000 for Commercial Optical. In response, Mr. Hagge terminated negotiations and

indicated he was no longer interested in purchasing Commercial Optical. By May 2, 1993, Commercial Optical was out of money and unable to continue its operations for any significant period of time. Given Commercial Optical's dire financial circumstances, Mr. Rips directed Mr. Slusky to contact Mr. Gardner in an attempt to restart negotiations. MJ Optical, however, was no longer interested in pursuing a merger or acquisition as outlined in the March 24, 1993 letter of intent. However, an agreement was reached whereby MJ Optical purchased some equipment for $100,000, the remaining inventory at cost, and certain intangible rights for $100. Ultimately, MJ Optical did not even purchase the inventory. It was sold to liquidators.

Under the terms of the Asset Purchase Agreement, MJ Optical had 45 days to move the equipment and inventory out of the optical plant. The parties agreed the effective date of the sale would be May 7, 1993. The Agreement also provided that MJ Optical could not manufacture any product at the Commercial Optical location. The Agreement also clearly indicates that MJ Optical would not be required to hire any of the employees of Commercial Optical. The Asset Purchase Agreement was signed by Mr. Rips on behalf of Commercial Optical on May 5, 1993 and by Mr. Hagge on behalf of MJ Optical on May 6, 1993.

On the morning of May 7, 1993, MJ Optical paid $100,000 to be held in trust by Commercial Optical, Inc.'s attorney until such time as MJ Optical confirmed the receipt of the assets purchased under the Agreement. The parties agreed that Commercial Optical's attorney, Mr. Slusky, and Commercial Optical's comptroller, Mr. Jack

Lawless, would inform the employees on May 7, 1993 (the effective date of the asset purchase agreement), that they were terminated. At that time, Mr. Hagge would inform the employees that MJ Optical would be accepting applications for employment.

On May 7, 1993, the employees were informed at a meeting attended by Jerry Slusky, Jack Lawless, Judy Biniamow, Commercial Optical's Human Resource Manager, and Michael Hagge that the plant was closing. On that same day, Ms. Biniamow prepared a written notice informing the employees about a meeting with the rapid response team from the Labor Department to discuss unemployment compensation, job placement and training. Mr. Hagge also addressed the employees to inform them that MJ Optical would be hiring and that the employees should submit their applications as soon as possible. Mr. Hagge anticipated that MJ Optical would hire as many as 75 of the former Commercial Optical employees. However, only 56 of the former Commercial Optical employees applied for positions. Of those who applied, MJ Optical hired 28. Ten to fifteen others were offered positions, but either refused the offer or accepted but failed to show up for work. Those who were not offered positions were rejected solely on performance grounds or based upon a lack of needed skills. MJ Optical even contacted 10-15 other former Commercial Optical employees, who did not submit applications, and offered them positions. MJ Optical's unsolicited offers were rejected.

2. The Petition Misrepresents the Decision of the United States District Court for the District of Nebraska.

Petitioners' description of the District Court decision states that "the district court's findings of fact and conclusions of law [App. *infra.*, 14(a)-31(a)] held that while WARN applied to the plant closing and termination of employees, neither the *buyer* nor the *seller* were responsible for the failure to give notice to the workers." (Petition for a Writ of Certiorari, p. 4 (emphasis added)). The description clearly implies that the District Court found that this transaction constitutes a "sale of all or part of a business" within the meaning of 29 U.S.C. § 2101(b). However, to the contrary, the District Court's decision specifically held that MJ Optical was not the "buyer" of all or part of Commercial Optical's business. (App., 29(a)).

3. The Petition Misrepresents the Decision of the United States Court of Appeals for the Eighth Circuit.

Once again, Petitioners' description of the Eighth Circuit's decision implies that the transaction involved in this case was found to be a "sale of all or part of a business" within the meaning of 29 U.S.C. § 2101(b). However, although the Eighth Circuit did not reach that issue, it did state: "We doubt that § 2101(b) applies to the mere sale of assets in this case." It did not address the issue further as it went on to find that under the plain meaning of the language of the statute, Commercial Optical was the party responsible for giving any required

WARN notice. It was, therefore, unnecessary to definitively rule on the other issues presented.

REASONS FOR DENYING THE WRIT

1. The Eighth Circuit's Opinion is Based Upon the Well Established Rule That Administrative Regulations Cannot Change the Plain Meaning of a Statute.

29 U.S.C. § 2101(b)(1) provides that the seller is responsible for providing WARN notice "up to and ***including*** *the effective date* of the sale . . . " (emphasis added) Assuming for the moment that this case involved the sale of all or a part of the business, the statute clearly provides that Commercial Optical is the party responsible for giving notice in this instance. The "effective date" was May 7, 1993. That is the same day the plant was closed. The Petitioners' entire argument rests on the Department of Labor's addition of the word "time" following the words "effective date" in the regulations. Specifically, the regulations provide:

> In the case of a sale of part or all of a business, Section 2(b) of WARN defines who the "employer" is. The seller is responsible for providing notice of any plant closing or mass layoff which takes place up to and including the effective date (time) of the sale, the buyer is responsible for providing notice of any plant closing or mass layoff that takes place thereafter.

The gist of the Eighth Circuit's decision is that the Department of Labor does not have the authority to change the plain meaning of a statute by regulation. It is well established law that the courts are the final authority

on matters of statutory construction, and are not required to rubber stamp their affirmance of administrative decisions [or interpretations] that are inconsistent with the plain meaning of a statute. *Chevron, Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 2781 n. 9, 81 L.Ed.2d 694 (1984); *SEC v. SLOAN*, 436 U.S. 103, 117-21, 98 S.Ct. 1702, 1711-1713, 56 L.Ed.2d 148 (1978); *United States v. Larinoff*, 431 U.S. 864, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977); and *Volkswagenwerk Aktiengesellscheft v. Federal Maritime Commission*, 390 U.S. 261, 272, 88 S.Ct. 929, 935, 19 L.Ed.2d 1090 (1968).

Contrary to Petitioners' claim, the regulation is not consistent with the plain meaning of the statute. Under 29 U.S.C. § 2101(b)(1), the seller is responsible for providing WARN notice, "up to and ***including*** *the effective date* of the sale. ***After*** *the effective date* of the sale . . . the purchaser shall be responsible for providing notice . . . " (emphasis added) The statute clearly provides that the seller, in this instance, Commercial Optical, is responsible for giving notice until the day after the effective date of closing. The "effective date" of the closing was May 7, 1993. That is the same day the plant was closed. Thus, even if the transaction was a "sale of all or part of a business" (which it was not), Commercial Optical would have been the party responsible for providing notice up until midnight of May 7.

The regulations are an obvious attempt to change the plain meaning of the statute by ending seller's responsibility for giving notice at the exact moment the closing occurs instead of at midnight on the effective date of closing. By inserting the word "time" to redefine "date" the Department of Labor has made the language of the

statute nonsensical. The phrase "up to and *including* the effective date of sale", establishes that Congress intended to place responsibility upon the Seller for the entire day. Including the "time" of sale makes no sense. How can the "time" of sale be "included"? Clearly the entire "date" can be "included", but the "time" cannot. The Department of Labor, however, would have us believe it was Congress' intent to say that Seller is responsible for giving notice up to and *including* the moment of sale. If that were indeed Congress' intent, it could have simply said Seller is responsible for providing notice until the moment the sale is closed and thereafter Buyer is responsible. This it did not do and regardless of the Department of Labor's reasoning or apparent preference for a different policy, it cannot by regulation alter the plain meaning of the statute. The Department of Labor's attempt to change the plain meaning of the statute by regulation is a nullity. *See McMartin Industries v. Vinal*, 301 F. Supp. 749 (D. Neb. 1969), *affirmed*, 441 F.2d 1274 (8th Cir. 1971).

Furthermore, it is only fair that any notice responsibility remain with Commercial Optical. The evidence established that Mr. Rips and Mr. Slusky were informed several days prior to May 7, 1993 that MJ Optical was not interested in continuing operations at the plant. The Asset Purchase Agreement specifically prohibited MJ Optical from manufacturing at the plant. The Asset Purchase Agreement also expressly stated that Commercial Optical was to assist MJ Optical in hiring some of Commercial Optical's employees. Obviously, Commercial Optical was aware that it would be closing the plant and terminating the employees on May 7, 1993. Otherwise

their agreement to assist MJ Optical in hiring certain employees would make absolutely no sense.

Simply stated, MJ Optical never employed the employees nor did it own or have the right to operate (or close) the manufacturing plant. MJ Optical did not have the authority or ability to close the plant or terminate the Commercial Optical employees. How can MJ Optical be required to give notice of a plant closing to people it did not employ regarding a plant MJ Optical did not own or control? Any interpretation of the statute which would hold MJ Optical responsible for providing notice would be unjust.

Petitioners also argue that the Eighth Circuit's interpretation of the statute leaves a gap in time when no one is responsible for giving WARN notice. Petitioners' argument is incorrect. Under the plain wording of the statute, the seller is responsible for giving notice of any plant closing which occurs "up to and including the effective date of sale." If we assume this transaction consisted of "a sale of all or part of a business" (which it was not), Commercial Optical would have been responsible for the plant closing if it occurred any time on the effective date of the sale, May 7, 1993. In fact, that is exactly the decision which was rendered by the Eighth Circuit Court of Appeals. The Eighth Circuit did not find that there was nobody responsible because the plant closing took place after the exact moment of the closing but before midnight on the effective date of the sale. Instead, the court held that "when Commercial agreed on May 5 to sell its equipment to MJ Optical without transferring the employees, Commercial had an obligation to notify the employees that they would lose their jobs in two days." 120 F.3d at

704. The Eighth Circuit then remanded the case to the District Court to calculate damages for Commercial's WARN violation. However, a victory against Commercial Optical clearly is not what Petitioners sought because Commercial Optical is a defunct corporation with no ability to pay a judgment.

2. There are no Conflicting Decisions.

Not only was the Eighth Circuit's decision based upon a well established rule of statutory construction, there are no decisions in any other circuit which are contrary to the Eighth Circuit's interpretation of the "effective date" language. None of the cases cited by Petitioners, *Finkler v. Elsinore Shore Assoc.*, 725 F. Supp. 828 (D. N.J. 1989); *IATSE v. Metrocolor Laboratories*, ___ F. Supp. ___, 5 IER 929 (C.D. CA 1990); and *International Alliance of Stage & Theatrical Employees v. Compact Video Services*, 50 F.3d 1464, 1468 (9th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 514 (1995), involved or discussed the discrepancy between the statute and the regulations with respect to the "effective date" issue.

In *Finkler*, a sale of the business (a casino) was contemplated but never completed. Prior to the consummation of the sale, the New Jersey Casino Control Commission appointed a conservator. Approximately one month after the appointment of the conservator the Commission determined all gaming operations had to cease. The next day the defendant informed the employees that they would be laid off in five days. The employees filed an action under WARN for failure to provide 60 days' notice. Defendant attempted to claim that it was not

subject to WARN because at the time of the "plant closing" it was not the employer, the conservator was. It was in this context that the court stated, "In other words, whoever is the employer at the time of the plant closing is responsible for notifying the employees sixty days in advance." *Id.* 725 F. Supp. at 831. Not only did *Finkler* not even involve "the sale of all or a part of a business", the court never addressed the inconsistency between the statute and regulations with respect to the date-time issue.

In *IATSE*, the issue was whether a former partner of an "employer" was entitled to summary judgment on the grounds that it withdrew from the partnership prior to the date of the plant closing. No sale of all or part of a business was involved whatsoever. The *International Alliance* case, on the other hand, clearly involved the sale of all or a part of a business. However, there was no plant closing. Instead, the union was attempting to allege that the sale of the business constituted a technical termination requiring the 60 day WARN notice, even though 309 out of the 314 employees were retained by the buyer. The union's main concern was that the employees were retained at lower wages. The court found, however, that a mere change in an employee's compensation or benefits did not amount to an "employment loss" under WARN. Thus, since there was no plant closing or significant employment loss, WARN did not apply.

In short, the Eighth Circuit decision is based upon a well established principle of statutory interpretation. There are no other decisions which conflict with the ruling of the Eighth Circuit in this matter. The court did not rule on the constitutionality or validity of the WARN Act. In fact, none of the considerations set forth in Rule

10 of the Rules of the Supreme Court of the United States apply to this case.

3. The Eighth Circuit's Opinion is Also Supported on Other Grounds.

As noted earlier, the District Court found that the transaction entered into between Commercial Optical and MJ Optical was not a "sale of all or part of a business" within the meaning of 29 U.S.C. § 2101(b). The Eighth Circuit did not adopt the District Court's decision with respect to its characterization of the transaction because it felt it was unnecessary given its ruling on the "effective date" issue. However, the Eighth Circuit stated, "We doubt that § 2101(b) applies to the mere sale of assets in this case." Both courts cited and relied on *Hedrick v. Rockwell Internat'l Corp.*, 24 F.3d 1272 (10th Cir. 1994) and *Oil, Chemical and Atomic Workers Internat'l Union v. CIT Group/Capital Equipment Finance, Inc.*, 898 F. Supp. 451 (S.D. Tex. 1995).

Furthermore, the lower court's decisions are correct because Petitioners failed to prove that the WARN Act even applied to the case at hand. Contrary to the District Court's finding that WARN's 100 employee requirement was met, the record clearly establishes that the evidence adduced by Petitioners was insufficient to carry its burden of proof on this issue.

Although the determination is extremely fact intensive and would require the review of all of the employees' records, it boils down to the fact that Petitioners alleged that Commercial Optical employed 100 "full-time" employees, but failed to prove it. The statute

defines the term "part-time employee" to mean an employee who averages fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required. 29 U.S.C. § 2101(a)(8). The evidence offered by Petitioners, however, merely showed the hours worked during the first 4 months and one week of 1993, and their original hire date. The exhibits did not establish that any of the employees actually worked 6 of the 12 months preceding the date upon which notice is required. In other words, any number of employees could have been on leave of absence or quit for a period of time and, thus, would have been "part-time employees" under WARN. There were, in fact, specific instances where the documents did establish that a certain employee had returned after some unknown period of absence. Petitioners' evidence was insufficient to prove Commercial Optical employed 100 "full-time" employees at the time of the plant closing.

The lower court decision is also supported by the fact that Petitioners failed to carry their burden of proving that 50 or more full-time employees suffered an "employment loss" due to the plant closing. Section 2101(a)(2) defines "plant closing" to mean a shut down which results in an "employment loss" for 50 or more employees excluding any part time employees. Several courts have held that employees who are offered positions on the date of plant closing, who refuse to apply for a position with the new company or who actually receive new positions without any gap in employment do not suffer an "employment loss" as defined in WARN. *See, Wiltz v. M/G Transport Services, Inc.*, 128 F.3d 957 (6th Cir.

1997); *Alter v. SCM Office Supplies, Inc.*, 906 F. Supp. 1243 (N.D. Ind. 1995); *Martin v. AMR Services Corp.*, 877 F. Supp. 108 (E.D.N.Y. 1995), *aff'd*, 68 F.3d 1529 (2d Cir. 1995); *Moore v. Warehouse Club, Inc.*, 992 F.2d 27, 30 (3d Cir. 1993); and *Rifkin v. McDonald-Douglas Corp.*, 78 F.3d 1277 (8th Cir. 1996). Without going into detail, the evidence did not establish that more than 50 full-time employees suffered an "employment loss" due to the plant closing. Under the statute and decisions, only those individuals who actually applied and were refused work at MJ Optical, at most 15 employees, can be said to have suffered an employment loss due to the plant closing. Thus, although neither of the lower courts specifically addressed these issues, their decisions are supported on these grounds in addition to those actually relied upon by the courts.

This is not a situation involving a willing buyer and a willing seller working out the sale of the seller's business. Rather, this is the classic example of a business which has become financially crippled with nothing to offer but the sale of some of its equipment. Other defenses, such as unforeseen business circumstances and the faltering company defense, were also established in the evidence before the District Court. 29 U.S.C. § 2102(b). These defenses could lead to the elimination of any notice requirement or the reduction of the required notice to a mere few days. Accordingly, the factual background of this case does not lend itself well or easily to the determination of those issues which the Petitioners would ask this Court to review.

CONCLUSION

For the reasons given above, Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

MJ OPTICAL, INC., a Nebraska Corporation, and OPTICAL ILLUSION, INC., a Nebraska Corporation, Respondents,

KEITH I. FREDERICK,
Counsel of Record
JAMES F. KASHER and
DAVID M. WILWERDING
CROKER, HUCK, KASHER, DEWITT,
ANDERSON & GONDERINGER, P.C.
2120 South 72nd Street, Suite 1250
Omaha, NE 68124
(402) 391-6777

Attorneys for Respondents
MJ Optical, Inc. and
Optical Illusion, Inc.